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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RUFINO ANAYA, Defendant and Appellant.	2d Crim. No. B291906 (Super. Ct. No. PA089375) (Los Angeles County)

Rufino Anaya appeals the judgment entered after he was convicted in a court trial of attempted murder (Pen. Code,[1] §§ 187, subd. (a), 664), two counts of assault with a deadly weapon (§ 245, subd. (a)), stalking (§ 646.9, subd. (a)), and battery against a person with whom he had a dating relationship (§ 243, subd. (e)(1)). The trial court also found true allegations that appellant personally used a knife to inflict great bodily injury upon the victim of the attempted murder (§§ 12022, subd.

[1] All statutory references are to the Penal Code unless otherwise stated.

(b)(1), 12022.7, subd. (a)) and had suffered a prior strike and serious felony conviction (§§ 667, subds. (a)-(j), 1170.12). The court sentenced him to 25 years and eight months in state prison. Appellant contends the judgment must be reversed because the record does not affirmatively show that he knowingly, voluntarily and intelligently waived his right to a jury trial. He further contends, and the People agree, that the eight-month sentence imposed on the stalking count should have been stayed under section 654. We shall order the judgment modified accordingly. Otherwise, we affirm.

STATEMENT OF FACTS

On January 25, 2017, appellant and his girlfriend K.O. got into an argument in a store parking lot. Appellant broke the windshield of K.O.'s car and choked her with one hand as he held a knife in the other hand. K.O. ran away and appellant chased her through the parking lot while holding the knife. Appellant also threatened to kill K.O. and her son.

K.O. and appellant ended their relationship in July 2017. On August 10, appellant told K.O. in text messages "[y]ou will see what I'm capable of doing. . . . I don't care if I die. I'm going to get you."

The following night, K.O.'s friend and coworker Daniel Martinez drove her to her job at a gas station. Appellant knew K.O. worked there and was aware of her schedule. When K.O. opened the door to get out of Martinez's vehicle, appellant appeared "out of nowhere," grabbed her by the hair with one hand, and dragged her approximately 35 to 40 feet while holding a knife in his other hand. Martinez intervened and wrestled with appellant, thereby freeing K.O. Appellant turned his attack on Martinez and stabbed him multiple times in the chest and arms before running away.

DISCUSSION

Jury Waiver

Appellant contends the judgment must be reversed because the record does not show that he knowingly, voluntarily, and intelligently waived his right to a jury trial. We disagree.

The right to trial by jury in criminal cases is guaranteed by the Sixth Amendment of the United States Constitution and article I, section 16 of the California Constitution. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149 [2 L.Ed. 2d 491, 496]; *People v. Ernst* (1994) 8 Cal.4th 441, 444-445.) This right is considered "fundamental to the American scheme of justice" (*Duncan*, at p. 149), and the denial of the right is a structural error that requires the judgment be set aside (*Ernst*, at pp. 448-449; *People v. Cahill* (1993) 5 Cal.4th 478, 501).

An accused, however, can expressly waive the right to trial by jury. (Cal. Const., art. I, § 16; *People v. Sivongxxay* (2017) 3 Cal.5th 151, 166 (*Sivongxxay*).) To be valid, the waiver must be "knowing and intelligent, [i.e.], ""made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it,"" as well as voluntary ""in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."""" (*People v. Collins* (2001) 26 Cal.4th 297, 305.) Whether a jury waiver is valid depends upon the totality of the circumstances. (*Sivongxxay*, at pp. 166-167.) A jury waiver is valid only if the record affirmatively shows it was knowing, voluntary and intelligent under the totality of the circumstances. (*People v. Daniels* (2017) 3 Cal.5th 961, 991 (*Daniels*) (lead opn. of Cuéllar, J.); see also *id.* at p. 1018 (conc. & dis. opn. of Corrigan, J.).)

At the change of plea hearing, the trial court told appellant "I was informed by your attorney that he had a discussion with

you today and you are willing to waive your right to have a jury trial and, instead, you'd like to have a court trial. Is that correct?" Appellant replied, "Yes."

The court continued: "Let me explain what that means to you for a moment, because this is an important decision for you to make. You have a right to have a jury trial. That means that both attorneys would select a jury of 12 members from the community who would hear the evidence and decide the case. And the jury would then decide whether or not the People have proved your guilt beyond a reasonable doubt. So that's what a jury does. . . . And at the time of trial, you have a right to confront and cross-examine witnesses called to testify against you, you have a right to present a defense on your own behalf, to use the subpoena power of the court at no expense to you, and a Fifth Amendment right. You would have all of those rights if you have a court trial. The only difference between a court trial and a jury trial is the following: At a court trial, I will decide the facts. I will render a decision based on the evidence presented at trial. But instead of having a jury decide, I will decide. Do you understand all of that, sir?"

Appellant verified that he understood and had no questions about the right he was waiving. The court then asked, "do you wish to waive and give up your right to have a jury trial and to have a court trial instead?" After appellant answered in the affirmative and defense counsel and the prosecutor joined in the waiver, the court found that appellant had "expressly, knowingly, understandably and intelligently waived his right to a jury trial."

Appellant contends that this colloquy is insufficient to demonstrate that his jury waiver was knowing and intelligent because the court did not inform him that any finding of guilt by a jury would have to be unanimous, or that he would have the

opportunity to participate along with his attorney in selecting the jury through the voir dire process. Our Supreme Court, however, has "persistently declined to mandate any specific admonitions describing aspects of the jury trial right." (*People v. Daniels* (2017) 3 Cal.5th 961, 992.) The focus of the analysis is not "whether the defendant received express rights advisements, and expressly waived them, [but] whether the defendant's admission was intelligent and voluntary because it was given with an understanding of the rights waived." (*People v. Mosby* (2004) 33 Cal.4th 353, 361.) Moreover, "'a defendant's prior experience with the criminal justice system' is . . . 'relevant to the question [of] whether he [or she] knowingly waived constitutional rights.' [Citation.]" (*Id.* at p. 365.)

In *Sivongxxay*, the court stated that "[g]oing forward, we recommend that trial courts advise a defendant of the basic mechanics of a jury trial in a waiver colloquy, including but not necessarily limited to the facts that (1) a jury is made up of 12 members of the community; (2) a defendant through his or her counsel may participate in jury selection; (3) all 12 jurors must unanimously agree in order to render a verdict; and (4) if a defendant waives the right to a jury trial, a judge alone will decide his or her guilt or innocence. We also recommend that the trial judge take additional steps as appropriate to ensure, on the record, that the defendant comprehends what the jury trial right entails. A trial judge may do so in any number of ways—among them . . . by asking the defendant directly if he or she understands or has any questions about the right being waived." (*Sivongxxay*, *supra*, 3 Cal.5th at pp. 169-170.) The court made clear, however, that this recommendation was merely "advisory" and that "a trial court's adaptation of or departure from the recommended colloquy in an individual case will not necessarily

render an ensuing jury waiver invalid. [Citations.] Reviewing courts must continue to consider all relevant circumstances in determining whether a jury trial waiver was knowing, intelligent, and voluntary." (*Id*. at p. 170.)

Here, the record affirmatively shows that appellant knowingly and intelligently waived his right to a jury trial. In addition to the change of plea colloquy, we are presented with evidence of appellant's 2017 guilty plea in another case to assault with a deadly weapon.[2] In his change of plea form in that case, appellant initialed his understanding that, among other things, he had a right to a jury trial in which "12 impartial jurors chosen from the community were convinced of my guilty beyond a reasonable doubt." The document also includes his prior attorney's signed statement that "I have explained each of the defendant's rights to the defendant and answered all of his or her questions with regard to those rights and this plea. I have also discussed the facts of the case with the defendant . . . and the consequences of the plea." As the People correctly note, these circumstances are substantially similar to those in *Sivongxxay*, in which the Supreme Court rejected a defendant's claim that his waiver of a jury in the guilt phase of a death penalty trial was not

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[2] At appellant's request, we have taken judicial notice of appellant's change of plea form in Ventura County Superior Court case number PA084466 and the reporter's transcript of the sentencing hearing in that case. (Evid. Code, § 452, subds, (a) & (c).) Although appellant correctly notes there is nothing to indicate that the trial court considered this evidence in upholding his jury waiver, the court's ruling is subject to our de novo review. (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1660.) In conducting this review, we may consider evidence that was not before the trial court when it accepted the defendant's jury waiver. (See *Sivongxxay*, *supra*, 3 Cal.5th at p. 167, fn. 2.)

knowing and intelligent. (*Sivongxxay*, *supra*, 3 Cal.5th at pp. 167-168; see also *id.*, at p. 169 [recognizing that "we have never insisted that a jury waiver colloquy invariably must discuss juror impartiality, the unanimity requirement, or both for an ensuing waiver to be knowing and intelligent"].)

The record also affirmatively shows that appellant's jury waiver was voluntary under the totality of the circumstances. Although appellant notes that the trial court did not expressly inquire into whether his waiver was voluntary, "[a] proper advisement and waiver of the jury trial right on the record generally establishes a defendant's voluntary and intelligent admission. [Citation.]" (*Daniels*, *supra*, 3 Cal.5th at p. 1018 (conc. & dis. opn. of Corrigan, J.).)

Appellant entered his jury waiver in open court while free of physical restraints. Prior to doing so, he spoke to his attorney and the trial court sufficiently advised him of the right he was waiving and the consequences thereof. Moreover, he told the court that he understood and had no questions regarding his right to a jury trial and did not hesitate in waiving that right. This record is sufficient to demonstrate that appellant's waiver was voluntary. (See *People v. Cunningham* (2015) 61 Cal.4th 609, 637 [rejecting death penalty defendant's claim that shackles rendered his guilt phase jury waiver involuntary where he entered an "express waiver . . . with counsel's consent and agreement . . . after a full explanation from the court of the right and the consequences of the waiver"].)

Although a robust advisement of a jury trial waiver is always preferable, "'[l]esser (even no) warnings do not call into question the sufficiency of the waiver so far as the Constitution is concerned.'" (*Sivongxxay*, *supra*, 3 Cal.5th at p. 170.) Because the record affirmatively shows that appellant's jury waiver was

knowing, voluntarily and intelligent under the totality of the circumstances, the alleged deficiencies in the trial court's colloquy do not render his waiver constitutionally invalid. (*Ibid.*; *Daniels*, *supra*, 3 Cal.5th at p. 1018 (conc. & dis. opn. of Corrigan, J.); *People v. Cunningham*, *supra*, 61 Cal.4th at p. 637.)

§ 654

In sentencing appellant, the trial court imposed a 14-year principal term for the attempted murder (count 1), a consecutive two-year sentence for assaulting K.O. with a deadly weapon (count 4), and a consecutive eight-month sentence for stalking K.O. (count 5). Appellant contends, and the People concede, that the sentence on count 5 must be stayed under section 654.

Section 654, subdivision (a) prohibits multiple punishment and provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Trial courts may not impose sentences precluded by section 654 because the defendant is subjected to the term of both sentences even though they are served simultaneously. (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

"The elements of the crime of stalking (§ 646.9) are (1) repeatedly following or harassing another person, and (2) making a credible threat (3) with the intent to place that person in reasonable fear of death or great bodily injury." (*People v. Ewing* (1999) 76 Cal.App.4th 199, 210.) "'[H]arasses' means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose." (§ 646.9, subd. (e).) "'[C]ourse of conduct' means two or more acts occurring over

a period of time, however short, evidencing a continuity of purpose." (§ 646.9, subd. (f).)

The People acknowledge that the "course of conduct" element of appellant's stalking conviction is based upon only two acts, i.e., the threats he made against her in text messages sent on August 10, and the assault he committed against her the following day. Because appellant was separately convicted of and punished for the assault, his eight-month sentence for stalking in count 5 must be stayed pursuant to section 654.

DISPOSITION

The eight-month sentence imposed on count 5 is ordered stayed under section 654. The clerk of the superior court shall prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Hayden A. Zacky, Judge
Superior Court County of Los Angeles

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill, Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.